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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SMS FINANCIAL LA, LLC,

Plaintiff and Respondent,

v.

MICHAEL J. KURGAN,

Defendant and Appellant.

B255617

(Los Angeles County
Super. Ct. No. BC259235)

APPEAL from a judgment of the Superior Court of Los Angeles County.
William F. Fahey, Judge. Reversed and remanded with directions.

Law Offices of Edward A. Cosgrove and Edward A. Cosgrove for Defendant and Appellant.

Law Offices of David W. Brody, David W. Brody, Nathan R. Berkeley and Kenneth R. Shemwell, for Plaintiff and Respondent.

Michael J. Kurgan appeals from the judgment following a bench trial that determined he was liable on his personal guaranty of a line of credit for his former business enterprise. We reverse and remand for a new trial because the trial court erred when it deprived Kurgan of his right to a jury trial.

FACTS AND PROCEDURAL HISTORY

In 2002 Union Bank obtained a default judgment against Michael J. Kurgan based on Kurgan's personal guaranty of a \$50,000 line of credit issued to his company, International Logistic Systems (ILS). Union Bank did nothing to enforce its judgment, which was eventually transferred to SMS Financial XVII, LLC, in late 2011. SMS renewed the judgment in February 2012. (Code Civ. Proc., § 683.110, et seq.) In October 2012, Kurgan successfully moved to vacate the default judgment because he had never been served with the summons and complaint. Kurgan then answered the complaint in November 2012.¹

A case management conference was set for April 26, 2013, but was continued to May 9, 2013. The conference statement submitted by Kurgan's lawyer on April 12 stated that Kurgan demanded a jury trial. On May 9, Kurgan's counsel posted the initial jury fees. (Code Civ. Proc., § 631, subd. (b).) The case management conference order signed by the court noted that Kurgan had demanded jury trial, and the box next to the designation "Defendant is to post jury fees" was left unchecked. Trial was set for January 13, 2014.²

¹ A default judgment was also entered against ILS in 2002. When Kurgan's lawyers filed Kurgan's answer in 2012, they also answered on behalf of his company. Kurgan later tried to strike the answer as to ILS because he did not authorize an answer on the company's behalf. The trial court denied his request to do so and judgment was eventually entered against ILS. The issues on appeal do not concern ILS and we do not mention it again.

² There is some confusion as to whether the parties appeared for the case management conference on the originally scheduled date, with the matter then continued to, and concluded on, May 9, 2013. The continuance notice, dated April 29, does not

One month later, Kurgan's lawyers substituted out and Kurgan represented himself from then on. At that time, several discovery motions by SMS were pending based on Kurgan's failure to properly respond to interrogatories and requests for admission. Those motions were eventually granted, with Kurgan ordered to answer the interrogatories while the requests for admission were deemed admitted. Kurgan was also ordered to pay combined monetary sanctions of \$2,700.

Over the next several months, Kurgan engaged in a series of questionable or improper litigation tactics. He never paid the discovery sanctions or provided the discovery responses ordered by the trial court; noticed an ex parte hearing and then failed to attend; appealed the non-appealable discovery orders (B251559, filed Sept. 20, 2013, dismissed March 5, 2014); filed but did not give proper notice of motions for rehearing on the discovery orders, a stay pending appeal, and for leave to file a cross-complaint; filed a writ petition with this court challenging the same discovery orders he had raised in his then pending appeal (B254026, summarily denied Feb. 5, 2014); moved to disqualify the judge; and failed to properly file court-ordered pretrial documents such as a witness list and jury instructions, resulting in a continuance of the final pretrial status conference that had been set for December 11, 2013.

When the continued status conference took place on January 6, 2014, SMS filed a motion for issue, evidentiary, or terminating sanctions based on Kurgan's tactics, along with an ex parte request for an order shortening time on hearing that motion. The hearing

state that the parties appeared on that date, but does state that the conference "has been continued," suggesting that nobody appeared because the conference had been continued beforehand. The trial court's case management order bears the handwritten date of April 25, 2013, to indicate when the conference was supposedly held, but is also hand-dated May 9 at the bottom and was file stamped on May 9 as well. Both parties agree that the April 25 date is a mistake, but SMS insists that the parties did appear on April 26. There is no reporter's transcript for that date, however, and nothing in the record shows that the parties appeared on April 26. Therefore, as we read the record, the parties did not appear for the case management conference until the continued date of May 9. As our discussion makes clear, this discrepancy makes no difference to our analysis.

started with the trial court complaining that Kurgan's most recent attempt at preparing a witness list and compilation of exhibits was lacking.

"Mr. Kurgan, we still have a problem with yours. Your witness statement is conclusory, and I can't tell what these various witnesses, in fact, are going to be testifying to. Court's case management order requires a detailed proffer of testimony. And your exhibit list is quite confusing. Plaintiff has Exhibits 1 through 'X'. Your exhibit list, it has both the number 1 and a number 'A', and then a 2 and a 'B'. I don't know which exhibits you're using. And I don't have exhibits in the form that are required by the court's order, which is in a binder, tabbed, and paginated." The trial court then told Kurgan it would sanction him \$250 if he did not correct those errors.

When counsel for SMS complained about Kurgan's proposed jury instructions, the trial court said, "There's no jury." When the SMS lawyer replied, "Oh, no jury," the trial court continued: "No. Nobody complied properly with all of the . . . filings for a jury. If you recall, the case management order has specific requirements. You all got them a long time ago. And you failed to properly get all the trial documents in and include the jury instructions and the like both in December, and here we are 30 days later, still don't have them. [¶] I am not going to permit a waste of the court's time and jury time as, Mr. Kurgan, you thumbed around trying to get your papers together. I've admonished you on many occasions you need to have a lawyer, and I can't give you special consideration. So this will be a bench trial, as previously indicated." The trial court then overruled Kurgan's objection to that decision.

When the trial began one week later, Kurgan renewed his objection to the loss of his jury trial right, contending that he had violated none of the statutory grounds that justified the loss of that right. (Code Civ. Proc., § 631.) The trial court said it would "make a clear record of what's gone on in this very old case. [¶] In sum, there have been multiple defaults and failures by you, Mr. Kurgan, to comply with court orders, the California Rules of Court, and the L.A. Superior Court rules." The trial court then set out what it considered the "relevant chronology," as follows: The May 2013 case management order required the parties to timely file all trial documents five days before

the final status conference or face a waiver of various rights, including the right to a jury trial; Kurgan failed to pay the court-ordered discovery sanctions; he did not give proper notice of his rehearing motions; Kurgan did not file any trial documents at the first status conference; despite being given additional time to do so, Kurgan did not comply because his witness and exhibit lists were defective; and, even when given yet another chance to correct his errors by January 9, Kurgan again provided noncompliant documents.

The trial court went on to state: “So I’ve advised you, Mr. Kurgan, on several occasions that you had to follow all the rules of court orders, and I couldn’t give you any special consideration because you’re choosing to represent yourself. But unfortunately, you’ve shown an unwillingness to comply with court orders and the rules. I’m not sure you appreciate how serious these proceedings are, and perhaps you’re just woefully [*sic*] choosing to disobey court orders; and this results in a substantial waste of this court’s time and resources and that of my staff as well, as the record demonstrates. We’re not going to be wasting the time of the jury given this history and your likely future violations because, again, I just don’t think you’re taking this very seriously. [¶] You’ve been warned on several occasions. Actions do have consequences; so this is one of those rare occasions where you have knowingly and deliberately taken actions which have resulted in a jury waiver.”

The trial court’s status conference order stated that “Kurgan’s failure to comply with the court’s case management order for over 30 days is deemed a knowing waiver of a jury trial.” After a bench trial, the trial court found for SMS and entered judgment against Kurgan for nearly \$180,000. Kurgan contends we must reverse because the trial court erred by holding a bench trial instead of a jury trial.

DISCUSSION

Under article 1, section 16 of the California Constitution, the right to trial by jury in civil cases is considered fundamental and inviolate, and any waiver of that right must occur by consent of the parties as provided by statute. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 951 (*Grafton*).) This provision is implemented by Code of

Civil Procedure section 631 (section 631). Subdivision (f) of section 631 provides several means by which the right to a jury trial may be forfeited or waived, including: failure to appear at trial; failure to demand jury trial within a specified period after the case is set for trial; failure to post jury fees at a specified time in advance of trial; oral consent in open court; or written consent filed with the clerk or the court. (*Grafton*, at p. 951, citing former subdivision (d) of section 631.)

It has been the rule since *Exline v. Smith* (1855) 5 Cal. 112, that section 631 prescribes the only means by which the right to jury trial may be waived, and that waivers pursuant to trial court rules are not permissible. (*Grafton*, *supra*, 36 Cal.4th at pp. 952-953, and cases cited therein.) The trial court made it clear that it was deeming waived Kurgan's right to a jury trial one week before trial began based on his repeated failures to comply with several court orders, particularly those relating to the preparation and presentation of certain pretrial documents. Because the trial court's finding of waiver was not based on any of the grounds enumerated in section 631, the trial court erred. That error is reversible per se.³ (*Villano v. Waterman Convalescent Hospital, Inc.* (2010) 181 Cal.App.4th 1189, 1205.)

SMS contends that Kurgan must show actual prejudice from the loss of his jury trial right. However, that rule applies only where the trial court has denied a party's request for relief from a prior waiver of jury trial and, instead of seeking a writ of mandate to correct the error, that party appeals an adverse judgment after the bench trial. (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698.) It therefore has no application here. However, SMS's entire opposition to Kurgan's appeal rests on this notion – that when Kurgan objected to the trial court's ruling about the loss of his jury trial right, he was in fact seeking relief from his jury trial waiver.

³ We acknowledge the trial court's patience and sympathize with its obvious frustration with a difficult and time-consuming litigant. While other potentially more severe remedies were available by means of SMS's motion for evidentiary, issue, or terminating sanctions, stripping Kurgan of his jury trial right on the trial court's stated grounds was not permitted.

The primary source of SMS's confusion comes from its reading of section 631, which states that a jury trial is waived if the party demanding a jury trial does not post a \$150 fee on or before the "date scheduled for the initial case management conference." (§ 631, subds. (c) & (f)(5).) SMS reads this to mean that Kurgan was required to post jury fees by April 26, 2013, the originally scheduled date of the case management conference. According to SMS, because Kurgan did not do so until the continued case management conference on May 9, 2013, he had already waived his jury trial right. Therefore, according to SMS, Kurgan's objection to the trial court's ruling at the January 6, 2014, pretrial status conference was nothing more than a request to be relieved from his previous waiver.

This contention suffers from two defects. First, we doubt whether SMS is correct that Kurgan's jury fees were untimely. Although the case management conference had been initially scheduled for April 26, 2013, as we read the record, it was continued to May 9, 2013 and did not take place before then. (See fn. 2, *ante*.) Arguably, therefore, the initial case management conference was eventually scheduled for the later date, at which point the jury fees were timely posted.

Second, even if SMS is correct about the fee timing issue, the trial court did not rely on that ground. The record clearly shows that the parties and the court believed the case was properly set for a jury trial up to the January 6 status conference. The timeliness of Kurgan's jury fees was never raised. Instead, the trial court decided on its own to find a waiver based solely on Kurgan's pretrial litigation tactics. At no time did the trial court mention the timeliness of the jury fees. Instead, when listing the actions that led to Kurgan's supposed waiver, the trial court on three separate occasions – the January 6 status conference, the January 7 status conference order, and on the first day of trial – mentioned only Kurgan's various violations of court orders, but never once mentioned section 631 or jury fees.

Had the trial court raised the timeliness issue at that time, Kurgan would have had the opportunity to address the timing of the case management conference and, under that scenario, relief from any supposed waiver would likely have been granted (§ 631,

subd. (g)) because the facts show nothing more than apparent inadvertence by Kurgan's counsel in posting the fees on the rescheduled date of the case management conference. They also show that SMS was ready and willing to proceed with a jury trial, and therefore could not have been prejudiced by doing so. On these facts, it would have been an abuse of discretion to deny a request for relief from the purported waiver. (*Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638 [all doubts are resolved in favor of granting relief from jury waiver and it is an abuse of discretion to deny relief from an inadvertent waiver if there has been no prejudice to the other party]; *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104 [trial court abused its discretion by failing to relieve a party from its jury waiver where counsel accidentally posted jury fees below the required amount].)

Of course, because the trial court's ruling was not based on the jury fee issue, we can never know how that sequence of events would have played out. Instead, it was based exclusively on Kurgan's failure to comply with various court orders, an error that is reversible per se.⁴

⁴ Kurgan contends that the trial court's adverse rulings and other conduct exhibited bias against him. We deem the issue waived because Kurgan has not analyzed the issue with citation to relevant legal authority. (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 732.) Neither does he ask us to reverse on that ground, contending that reversal is clearly required due to the loss of his jury trial right. In any event, numerous adverse trial court rulings, even erroneous ones, do not establish a charge of judicial bias, especially when they are subject to review. (*People v. Avila* (2009) 46 Cal.4th 680, 696.) Although Kurgan complains generally about some of the trial court's rulings in his appellate briefs, he makes no proper arguments concerning their validity and has not raised them as issues on appeal.

Kurgan also contends that his initial jury fees were timely under subdivision (c)(4) of section 631, which states that fees can be posted as late as 25 days before trial for a party who did not appear until more than one year after the complaint was filed. We understand Kurgan's point – he did not appear until many years after the complaint was filed because he was never properly served. We believe the provision is aimed at protecting the rights of newly discovered defendants and other late entrants to an ongoing action and therefore has no application here. In any event, that issue could have been raised and resolved below had the trial court found a jury waiver based on the jury fee

DISPOSITION

The judgment is reversed and the matter is remanded for a new trial. Appellant shall recover his costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

timeliness issue. Because the matter was never litigated, we decline to address it on appeal.